

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

FRED CHISOM,

Plaintiff,

v.

CLALLAM BAY CORRECTIONS MAIL  
ROOM, C/O JOHN AND JANE DOE,

Defendants.

Case No. C04-5588RBL

REPORT AND  
RECOMMENDATION

Noted for November 25, 2005

This matter comes before the court sua sponte after the initial review of the complaint, amended complaint and plaintiff's response to the court's order to cure certain deficiencies. For reasons set forth below, the undersigned recommends that plaintiff's action and complaint be dismissed as frivolous.

DISCUSSION

A complaint is frivolous when it has no arguable basis in law or fact. Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before service of process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (*citing Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984)). A plaintiff must allege a deprivation of a federally protected right in order to set forth a *prima facie* case under 42 U.S.C. § 1983. Baker v. McCollan, 443 U.S. 137, 140 (1979). In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law and that (2) the

1 conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the  
2 United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*, Daniels v.  
3 Williams, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if  
4 both of these elements are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert.*  
5 *denied*, 478 U.S. 1020 (1986). Section 1915(e) of the PLRA requires a district court to dismiss an in  
6 forma pauperis complaint that fails to state a claim. 28 U.S.C. § 1915; Barren v. Harrington, 152 F.3d  
7 1193, 1194 (9th Cir.1998).

8 Here, plaintiff's application to proceed *in forma pauperis* was approved and his § 1983 amended  
9 complaint alleges his legal mail was properly submitted, but was rejected for no significant reason. Plaintiff  
10 has been given two opportunities to amend the complaint. Most recently the court explained that the  
11 complaint was deficient due to the lack of factual allegations showing how any individual personally  
12 participated in the alleged deprivation and how the alleged rejection of his legal mail has caused any actual  
13 injury to support an access to courts claim. Plaintiff has responded to the court's order, making broad  
14 allegations that the rejection of his legal mail was racially motivated and retaliatory. Plaintiff does not  
15 make sufficient factual allegations to support his claims.

16 The Ninth Circuit has determined that "right of access" claims that do not allege inadequacy of the  
17 law library or inadequate assistance from persons trained in the law, must allege an "actual injury" to court  
18 access. Sands v. Lewis, 886 F.2d 1166, 1171 (9th Cir. 1989). An "actual injury" consists of some specific  
19 instance in which an inmate was actually denied access to the courts. Id. Only if an actual injury is alleged  
20 may plaintiff's claim survive. Id. To state a 1983 claim based on retaliation, plaintiff must allege (1) the  
21 type of activity engaged in was a protected right under the constitution; and (2) the State impermissibly  
22 infringed on the right to engage in the protected activity. Rizzo v. Dawson, 778 F.2d 527, 531 (9th Cir.  
23 1985). Plaintiff also must establish that the retaliatory act does not advance legitimate penological goals,  
24 such as preserving institutional order and discipline. Id.; Barnett v. Centoni, 31 F.2d 813, 816 (9th Cir.  
25 1994).

26 Plaintiff's complaint, amended complaint, and response to the court's order do not provide  
27 sufficient facts to support a constitutional claim. In each instance the court directed plaintiff to cure  
28 certain defects, and in response plaintiff has failed to cure those deficiencies and/or changed the basis of the

1 underlying claims.

2 CONCLUSION

3 Because plaintiff fails to state a cognizable §1983 constitutional claim, the Court should DISMISS  
4 this case as frivolous. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil  
5 Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also*  
6 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.  
7 Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is  
8 directed to set the matter for consideration on **November 25, 2005**, as noted in the caption.

9 DATED this 31<sup>st</sup> day of October, 2005.

10  
11 /s/ J. Kelley Arnold  
12 J. Kelley Arnold  
13 United States Magistrate Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28